Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term 1997

MICHAEL S. ALLRED,

Petitioner,

v.

MOORE & PETERSON, A Professional Corporation; Gaynell C. Methvin; Mark David; Paul R. Aiello; Camille F. Gravel, Jr., Individual Member of Gravel Brady & Berrigan, a Partnership,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the Court of Appeals erred in its holding that the "effects" test adopted by this Court in *Calder v. Jones* is not a substitute for "purposeful availment."

2. Whether the Court of Appeals erred in its holding that there were insufficient contacts with the forum state to support the exercise of *in personam* jurisdiction over the out-of-state tortfeasors in this case.

3. Whether the Court of Appeals erred in refusing to consider the residence of the plaintiff or the nexus of the facts underlying the case with the forum in ruling that there were insufficient contacts to support the exercise of *in personam* jurisdiction.

4. Whether the Court of Appeals' ruling that the reach of the Mississippi long-arm statute is less extensive than that allowed by the due process clause is contrary to the pronouncement of Mississippi's highest court.

5. Whether the Court of Appeals' interpretation of the Mississippi long-arm statute, as it relates to the requirement that injury occur in Mississippi is contrary to the clear meaning of the statute and the pronouncements of Mississippi's highest court.

Rule 14.1(b) Statement

The caption of this petition reflects all parties to the proceeding in the court whose judgment is sought to be reviewed. None of the parties to this action has any parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael S. Allred ("Allred") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in favor of Respondents Moore & Peterson, Gaynell Methvin, Mark David, Paul R. Aiello, and Camille F. Gravel, Jr.

Opinions Below

The opinion of the Court of Appeals is reported at 117 F.3d 278. The unpublished opinions of the United States District Court for the Southern District of Mississippi (Henry Wingate, J.) are included in the appendix to this petition.

Jurisdiction

The Court of Appeals entered judgment on July 21, 1997. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

Statutory Provisions and Rules Involved

The statutory provision involved in this petition is Miss. Code Ann. § 13-3-57 (Supp. 1996). Rule 12(b)(2) of the Federal Rules of Civil Procedure is tangentially involved in this petition.

Statement of the Case

This is an action for abuse of process and/or malicious prosecution. The suit arose from a frivolous third-party complaint, containing false allegations of fraud, filed by the defendants as attorneys for Charles C. Rush against Petitioner Allred solely for the ulterior purpose of forcing Allred to withdraw as counsel in the underlying lawsuit. Mr. Rush was named as a defendant in the present action, but filed a suggestion of bankruptcy. The attorney defendants are Moore & Peterson, a Dallas, Texas law firm which represented Charles C. Rush; Gaynell C. Methvin, Mark David, and Paul Aiello, members of Moore & Peterson, who actually participated in the representation of Mr. Rush; and Camille F. Gravel, Jr., a Louisiana attorney who acted as local counsel for Rush and signed the third-party complaint against Allred.

A. Prior Proceedings In This Case

This case was filed by Michael Allred, a resident of Mississippi, in the Circuit Court for the First Judicial District of Hinds County, Mississippi in August, 1993. Defendants removed the case to the United States District Court for the Southern District of Mississippi and filed motions to dismiss. The case was dismissed by the trial court for lack of *in personam* jurisdiction. That holding was affirmed by the Court of Appeals for the Fifth Circuit.

B. Factual Background

In 1977, Allred, represented American Public Life Insurance Company (APLIC), which was plaintiff in a lawsuit filed in Mississippi against Richard O. Rush, Charles C. Rush, and Southern Educators Life Insurance Company (SELIC), among others. This lawsuit (the "Mississippi Lawsuit") involved allegations that the Rushes and SELIC had breached their fiduciary duties and various securities laws and regulations in their dealings with and on behalf of APLIC. The essence of the suit was that the Rushes, as directors of APLIC, had caused APLIC to make investments in several properties that were either worthless or were worth substantially less than the amount which APLIC paid for them. This suit was settled as between APLIC, on the one hand, and Charles and Richard Rush and SELIC on the other. The settlement was consummated by an agreement dated December 31, 1978. In conjunction with this settlement, the parties also executed a Mutual Release and Covenant Not to Sue ("The Release") on February 26, 1979. This settlement was negotiated by the parties in Jackson, Mississippi, and was executed by all parties in Jackson, Mississippi. The Release provided that neither APLIC nor anyone acting on its behalf would sue the Rushes or SELIC for any actions taken by them prior to February 26, 1979. Under the terms of the Settlement Agreement, SELIC and the Rushes made substantial payments to APLIC and bought from APLIC the several over-valued assets which the Rushes had caused APLIC to purchase.

SELIC, which had changed its name to First American Life Insurance Company (FALIC), was placed in rehabilitation by the Insurance Commissioner of the State of Louisiana. In early October, 1984, the

Commissioner retained Allred to prosecute claims on behalf of SELIC/FALIC against Charles C. Rush, among others. In April, 1986, Allred filed a complaint charging Rush with fraud, breach of fiduciary duty, conversion and other breaches of statutory and common law duties to FALIC. Suit was filed in United States District Court for the Middle District of Louisiana (the "Louisiana Lawsuit"). The purchases of over-valued assets from APLIC, which the Rushes caused SELIC/FALIC to make pursuant to the Settlement Agreement which terminated the Mississippi Lawsuit, were listed in the Complaint as actions which the Rushes had taken in violation of their fiduciary duties to SELIC/FALIC. In April 1986, the defendants, acting as attorneys for Rush, filed a Third-party Complaint against APLIC and Allred, falsely alleging (1) that the Louisiana Lawsuit was brought on behalf of APLIC, because APLIC was to benefit from any judgment awarded to SELIC/FALICin the Louisiana Lawsuit by virtue of a reinsurance agreement which APLIC had with SELIC/FALIC; and (2) that Allred had instigated the bringing of the Louisiana Lawsuit. According to Rush's Third-party Complaint, these actions amounted to a breach of the Release which had been executed at the conclusion of the Mississippi Lawsuit. This claim was asserted against Allred although the Louisiana Lawsuit was brought by the Louisiana Insurance Commissioner as Rehabilitator for SELIC/FALIC, with Allred merely acting as counsel for SELIC/FALIC; neither Allred nor APLIC were parties to the Louisiana Lawsuit; the Release, on which this count of the Third-Party Complaint was based, did not prevent SELIC/FALIC from suing Rush; and Allred was not a party to the Release.

Rush also asserted a claim that to the extent that any fraud or malfeasance had been committed in connection with the purchase by SELIC of the over-valued assets from APLIC, Allred and APLIC were joint tort-feasors with regard to those purchases. This claim was made against Allred although: (1) Allred's only involvement in the negotiations leading up to the settlement of the Mississippi Lawsuit had been as counsel for one of the litigants; (2) the negotiations had been conducted at arm's length, with Allred acting as agent for a disclosed principal; and (3) the method of purchase of the over-valued assets from APLIC was proposed by Rush and/or his attorneys. All claims against Allred were ultimately dismissed, but Allred was forced to cease participation in representing the Insurance Commissioner during the course of the litigation.

The Release was negotiated in Mississippi and executed by all parties in Jackson, Mississippi, to settle a lawsuit that was then pending in a Mississippi court. The actions taken by Allred, which Defendants herein, acting as counsel for Charles Rush, alleged constituted Allred's complicity in Rush's fraud, were all taken by Allred in Mississippi. Service of process was had upon Allred, at the instance of the defendants, at his offices in Jackson, Mississippi.

In summary, Allred was served with process at his office in Jackson, Mississippi, in an action which was intended not to obtain damages from Allred, but for the ulterior purpose to force him to withdraw as counsel for the Commissioner, which purpose was achieved. The suit against Allred was based upon his alleged breach of a Release which was negotiated and executed in Mississippi to settle a Mississippi lawsuit, and for actions which he

took while acting, in Mississippi, as attorney for a Mississippi corporation. All of this was known by the defendants at the time they instituted the baseless action with false allegations of fraud against Allred.

Reasons for Granting the Petition

Certiorari should be granted pursuant to Rule 10 because the decision of the Court of Appeals addresses an important federal question in a manner inconsistent with the decisions of other courts of appeals and relevant decisions of this Court.

In the instant action, the United States Court of Appeals for the Fifth Circuit has ruled in a manner that is inconsistent with this Court's opinion in *Calder v. Jones*, 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984). Specifically, the Court of Appeals ruled that the holding of *Calder* was not applicable, because "the effects test [established in *Calder*] is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state." *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997) (App. 20a[1]). This holding is inconsistent with the Supreme Court's opinion in *Calder* and with the interpretation given the holding of that case by other courts of appeals.

In *Calder* this Court clearly stated that where it is alleged that the defendant has committed an intentional act, directed at a resident of the forum state, with knowledge that harm would occur in the forum state, the minimum contacts/purposeful availment test is met even

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1 Citations to "App." are to the Appendix to this Petition followed by the page number.

though the defendant never physically entered the forum state and had no other contacts with that state.

Other courts of appeals have interpreted *Calder* as standing for the proposition that when the defendant has intentionally committed an act in a foreign state that was purposefully directed at a resident of the forum state, the purposeful availment test is met. *See*, e.g. *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989); *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990); and *CoblentzGMC/ Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364, 1368 (M.D. Ala. 1989), aff'd without opinion, 932 F.2d 977 (11th Cir. 1991).

Because the Fifth Circuit's ruling is inconsistent with both the opinion of this Court in *Calder* and the opinions of other courts of appeal on the issue of whether the intentional commission of a tortious act aimed at a resident of the forum state, with knowledge that the effect of the act will be felt in the forum state is alone sufficient to support the exercise of *in personam* jurisdiction over the actor in the forum state, certiorari should be granted.

I. The Fifth Circuit's Holding Is Inconsistent With Rulings of This Court

The Court of Appeals entered into no significant analysis in deciding the due process issue in this case. Instead, it quoted extensively from and adopted the opinion of the Seventh Circuit in *Wallace V. Heron*, 778 F.2d 391 (7th Cir. 1985). The facts in *Heron* and those in the case *sub judice* are similar. In *Heron*, the Seelys had discussed with Rod Wallace their interest in having a franchise to sell log homes in northern California. At the time, both the Seelys and Wallace were residents of

Indiana. Wallace introduced the Seelys to his contacts in the business and the Seelys purchased a franchise from Real Log Homes, Inc. ("RLH") and moved to California. The business endeavor did not go well and the Seelys brought suit in California against RLH and Wallace, although Wallace had never been an agent of RLH. Heron served as attorney for the Seelys in the California litigation from its inception, but withdrew before the matter went to trial. After Heron withdrew from the representation, the Seelys dismissed all claims against Wallace. Wallace then filed a malicious prosecution action in Indiana against Heron and other attorneys in his office, all of whom were California residents and had no significant contacts with Indiana other than their involvement in the prosecution of a frivolous action against a resident of that state. The defendants moved to dismiss for lack of personal jurisdiction. Wallace relied upon *Calder v. Jones*, arguing that the service of complaints, interrogatories and requests for production of documents on him in Indiana established the requisite minimum contacts.

The Seventh Circuit rejected this argument, stating that Wallace's reliance on *Calder* was misplaced. Specifically, that court said

> The Supreme Court in *Calder* did not make the type of dramatic change in the due-process analysis of *in personam* jurisdiction advocated by the plaintiff. Rather, the so-called "effects" test is merely another way of assessing the defendant's relevant contacts with the forum State. The defendant must still "purposefully avail [himself] of the privilege of conducting

> activities within the forum State, thus invoking the benefits and protections of its laws."

Wallace v. Heron, 778 F.2d at 395 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L.Ed.2d 528, 542, 105 S.Ct. 2174, 2183 (1985). The Fifth Circuit adopted the reasoning of the Seventh Circuit as the holding in this case. *Allred*, 117 F.3d at 286-87 (App. 21a-22a). In doing so, the court of appeals applied *Burger King*'s breach of contract analysis to an action involving allegations of an intentional tort.

Both the Seventh Circuit and the Fifth Circuit failed to recognize that this Court had made clear in *Burger King* that a different due process analysis would have been involved had Rudzewicz appealed the judgment against him for trademark infringement, an action traditionally viewed as sounding essentially in tort. In so doing, this Court cited *Calder* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 79 L.Ed.2d 790, 104 S.Ct. 1473 (1984), as cases which set out the proper analysis to be applied to actions involving allegations of "tortious out-of-state conduct." *Burger King*, 471 U.S. at 469, n. 11, 85 L.Ed.2d at 539, n. 11.

The court of appeals also ignored or misread the clear holding of *Calder* itself. Although the words "purposeful availment" do not appear in the *Calder* decision, that case can only be read as establishing the proposition that when a defendant has intentionally committed a tortious act, directed at a resident of the forum state, with knowledge that the act will result in injury in the forum state, the purposeful availment test has been met, regardless of the fact that the defendant's

actions were all committed outside the forum state. The Fifth Circuit has treated *Calder* as nothing more than an anomaly, which was overruled, or at least substantially modified, without comment, in *Burger King*.

The Fifth Circuit's opinion also conflicts with established Supreme Court precedent in that it ignores the fact that the case *sub judice* arose from events that were centered in Mississippi. As set out more fully above, in the suit which the defendants filed against Allred, they alleged that he had breached a contract which was negotiated and signed in Mississippi, the state of Allred's residence and law practice. The contract which Allred allegedly breached was made in settlement of a lawsuit which was then pending in a Mississippi court. The complaint filed against Allred also contained allegations of his complicity in fraud. All of the actions which were alleged to have constituted Allred's participation in fraud were committed by Allred in Mississippi. The only reason the suit against Allred which gave rise to the instant action was brought in Louisiana is because Allred had filed suit in the United States District Court for the Middle District of Louisiana on behalf of the Insurance Commissioner of Louisiana as receiver for one of the parties to the settlement agreement which had been negotiated in Mississippi against other parties to that same settlement agreement.

As this Court stated in *Calder*:

> **The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction, . . . but they may be so manifold as to permit jurisdiction when it would not otherwise exist in their absence.**

Calder v. Jones, 465 U.S. at 788, 79 L.Ed.2d at 811. The Fifth Circuit failed to find any relevance in the fact that the events which gave rise to the suit against Allred all occurred in Mississippi. Instead, that court noted only that Allred was a resident of Mississippi and was served with process there. The court found that contact to be merely fortuitous, stressing that the defendants' actions had been taken in connection with a lawsuit that was pending in Louisiana. In fact, the one truly fortuitous state connection in this action was that the suit was brought against Allred in Louisiana. Had it not been for Allred's appearance as counsel for the Louisiana Insurance Commission in that suit, the allegations against Allred would necessarily have been made, if at all, in an action filed in Mississippi, where Allred resided and practiced law, and where all of the events on which the claims against Allred were based took place.

This Court should grant *certiorari* in this case to correct the Fifth Circuit's misconception of the holding in *Calder*.

II. The Fifth Circuit's Holding Is Inconsistent With Rulings of Other Circuit Courts of Appeals

Following this Court's issuance of its opinion in *Calder*, the lower federal courts have issued conflicting opinions in their struggle to determine its precise scope. The decision of the Fifth Circuit in this case does not comport with the decisions of other courts of appeals with regard to the basic interpretation of *Calder*.

As noted above, in the case *sub judice*, the Fifth Circuit held, in reliance on the Seventh Circuit's opinion

in *Wallace v. Heron*, that *Calder* had made no change in the due process analysis of personal jurisdiction questions, and the "effects" test adopted in *Calder* did not provide a substitute for the traditional "purposeful availment" requirement. Specifically, the lower court held that when a defendant has intentionally committed a tortious act, aimed at a resident of the forum state, with knowledge that it will cause injury to the plaintiff in the forum state, that is but one contact to be weighed along with others in the due process analysis. *Allred*, 117 F.3d at 286-87 (App. 20a-22a).

Other courts of appeals have held otherwise. The First Circuit has read *Calder* as establishing that "The knowledge that the major impact of the injury would be felt in the forum state constitutes a purposeful contact ... ." *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989) (finding jurisdiction proper). The Ninth Circuit, which gave birth to the "effects" test approved in *Calder*, gives *Calder* the same interpretation. In *Paccar International, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058 (9th Cir. 1985), the Ninth Circuit first noted that there were three requirements which had to be satisfied to establish specific personal jurisdiction: (1) the defendant must perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Id* at 1062. The court then held:

> The commission of an intentional tort in a state is a purposeful act that will satisfy the first two requirements ... . A tortious act, standing alone, can satisfy all three requirements ... if the act is aimed at a

> resident of the state or has effects in the state.

Id at 1064 (citing *Calder v. Jones*).

In affirming the trial court's dismissal of Allred's claims, the Fifth Circuit also stated that the service of process and other papers on Allred where he lived and practiced law was not sufficient contact with the State of Mississippi, because the location of Allred's residence and business office, and the fact that he was served there, were mere fortuities. The Fifth Circuit's ruling also conflicts with other decisions of the courts of appeals, such as *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990). In *Metropolitan Life*, Ronald Gambrell, at time of his death, had a life insurance policy with Met Life. There were two designated beneficiaries, his mother, Geneva Gambrell, and "James L. Neaves, Jr., nephew". The real James L. Neaves, Jr. had died before the policy was even taken out, and the insured was aware of his death. He meant by the designation of James L. Neaves, Jr. to designate a person who had assumed the nephew's identity. Gambrell's mother knew of her son's intention in making the designation. However, when Met Life contacted her following the insured's death, she wrote to Met Life, explaining that the other intended beneficiary was dead and provided Met Life with a copy of the real James Neaves' death certificate. The letter and death certificate were mailed to Met Life's office in California. When the fictitious James Neaves (hereinafter "Neaves") learned that the entire proceeds had been paid to Geneva Gambrell, he filed a claim against Met Life, demanding that he be paid according to the beneficiary designation. Met Life then filed a declaratory judgment action in California, naming "Neaves" and Geneva

Gambrell as defendants. "Neaves" was a California resident, while Gambrell made her home in Alabama. "Neaves" filed a counterclaim against Met Life and a cross claim against Geneva Gambrell. Ms. Gambrell moved to dismiss for lack of personal jurisdiction. The trial court granted the motion, finding that the mailing of the single letter to Met Life in California was not sufficient contact with that state to support the exercise of personal jurisdiction over Ms. Gambrell, who had no other contacts with California. The Ninth Circuit reversed, holding that the single contact was sufficient under the Supreme Court's holding in *Calder*, because both Met Life and "Neaves" alleged in their complaints against Gambrell that she had fraudulently represented, in the letter which she mailed to Met Life in California, that the person she knew to be the intended beneficiary was dead. Ms. Gambrell argued that it was "only fortuitous" that the letter had been sent to California, since she could have sent it to Met Life's corporate office in New York. The Ninth Circuit found this argument to be to no avail, because it "ignores the relevant consideration under *Calder* of the effect of the conduct on the forum state." Because Ms. Gambrell was alleged to have intentionally taken an action which she knew would injure "Neaves," a resident of California, the California court's exercise of jurisdiction over her was held to be proper on that basis.

The Fifth Circuit's holding that meeting the "effects" test adopted in *Calder* does not satisfy the "purposeful availment" requirement stands in clear conflict with the pronouncements of other federal courts of appeal on that precise issue. Furthermore, the Fifth Circuit's holding that the residence of the plaintiff is merely fortuitous is in conflict with the holdings of other

courts of appeal that such an argument ignores the "effects" test which the Fifth Circuit admitted should be applied.

Calder was decided almost fourteen years ago. The lower federal courts are still in substantial dispute as to its meaning and as to the proper application and scope of the "effects" test adopted in that opinion. This Court should grant certiorari in this case to resolve this conflict.

III. The Court of Appeals Misapplied the Law of Mississippi

The Court of Appeals' holding that the Mississippi long-arm statute does not grant jurisdiction to the Mississippi Courts is erroneous and ignores precedents established by Mississippi's highest court. Allred alleges that the defendants were guilty of both abuse of process and malicious prosecution in suing him in the underlying case. The Mississippi Supreme Court has stated that the reach of Mississippi's long arm statute is coextensive with the reach permissible under the Constitution.

The only restriction placed on states in hearing out-of-state claims is the Constitutional limit placed on our long-arm statute. So long as an out-of-state litigant has enough minimum contacts in Mississippi so that the maintenance of a suit "does not offend the traditional notions of fair play and substantial justice," our courts have the power to hear a suit. *Shewbrooks v. A.C. and S. Inc.*, 529 So. 2d 557, 565 (Miss. 1988). The Court of Appeals held precisely to the contrary, citing two of its own prior opinions. *Allred*, 117 F.3d at 282 (App. 9a).

The tort prong of the Mississippi long-arm statute provides that Mississippi courts have jurisdiction if a tort is committed "in whole or in part" against a Mississippi resident such as Allred within the borders of the State. Miss. Code Ann. Sec. 13-5-57 (Supp. 1996).

The Court of Appeals correctly identified the three elements of the tort of abuse of process in Mississippi:

> "(1) the party made an illegal use of the process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of the process." McLain v. West Side Bone & Joint Ctr., 656 So. 2d 119, 123 (Miss. 1995).

Allred, 117 F.3d at 284 (App. 13a). Allred's complaint alleges that the defendants filed a third-party claim against him containing knowingly false allegations of fraud, served process on him in Mississippi for the purpose of forcing him to withdraw as counsel for the Insurance Commissioner in the underlying case, achieved their improper purpose, and Allred was damaged thereby emotionally and economically in Mississippi. (Complaint, Para. 65, 68, 73; App. __). Thus at least two of the three elements of the tort, improper use of process and damages, occurred in Mississippi. The Court of Appeals essentially ignores these allegations in its flawed analysis of the abuse of process contentions of Allred. Erroneously claiming that Allred does not allege that process was issued with "any corruption or impropriety" (*Allred*, 117 F.3d at 284) (App. 13a), the Court of Appeals states that Allred thus has not properly plead the tort of abuse of process. To the contrary, Allred clearly alleged that the defendants served the third-party complaint on

him to force him to withdraw as counsel, not for the proper purpose of obtaining damages from him. This contention is borne out by the fact that the Defendants sought no discovery against him and ultimately dismissed the case against him with prejudice without either trial or receiving any settlement payment from him. It is precisely such misuse of process as Allred alleged which falls within the tort of abuse of process. See *Brown v. Edwards*, 721 F.2d 1442, 1454 (5th Cir. 1984) (The gravamen of the misconduct for which the liability . . . is imposed . . . is the misuse of process, no matter how properly obtained, for any purpose other than that for which it was designed to accomplish.") citing *Restatement (Second) of Torts* Sec. 682, comment a; *Prosser and Keeton on Torts*, 898 (5th ed. 1984) ("first, an ulterior purpose . . . . Some definite act . . . aimed at an objective not legitimate in the use of the process, is required.")

The Court of Appeals does not mention Allred's "injury" in its analysis of his abuse of process claim. Apparently the Court of Appeals is relying on a differentiation between "injury" and "damages" to hold that no "injury" occurred in Mississippi so as to invoke that state's long-arm statute. Regardless of the correctness of the court's analysis of "injury" and "damages" in considering the tort of malicious prosecution, it is clearly erroneous when applied to the tort of abuse of process. As noted by one federal court in dismissing a claim for abuse of process under Mississippi law where process had not been issued, "Without the issuance of legal process, there can be no abuse thereof." *Padgett v. Palmer*, 856 F. Supp. 1185, 1190 (S.D. Miss. 1994). It is undisputed that process was served on Allred in Mississippi. Since service of process is an essential part of the tort of abuse of process, no tort existed until process

was served upon Allred in Mississippi and Allred was damaged. Since Allred was forced by the allegations in the third party complaint to withdraw from the case, he clearly suffered economic loss in his Mississippi law practice. Thus the tort was committed, at least in part, in Mississippi, and this case falls squarely within the ambit of the Mississippi long-arm statute.

The Court of Appeals also misapplied Mississippi law in its analysis of the malicious prosecution claim. As noted by the Court of Appeals in its own opinion, malicious prosecution may arise from either the institution or continuation of judicial proceedings with malice and without probable cause. *Mississippi Road Supply v. Zurich-American Ins. Co.*, 501 So. 2d 412, 414 (Miss. 1987). The Court of Appeals then concludes that no part of the tort of malicious prosecution occurred in Mississippi because defendants filed suit in Louisiana, thus causing Allred's "injury" to occur in that state.

The Court of Appeals' analysis ignores the fact that defendants had to continue their prosecution of the case beyond the mere filing of the suit to cause Allred any injury. Defendants had to serve Allred, who was in Mississippi, with the third-party complaint or it would have been subject to early dismissal under Rule 4(m), Fed. R. Civ. P. and would have caused no injury to Allred.

Thus, even if the Court of Appeals' analysis of Mississippi law were correct, and there is a distinction between "injury" and "damages" (a distinction which the Mississippi Supreme Court has never made), the application of that principle to the present case does not divest the Mississippi courts of jurisdiction.

Conclusion

Issuance of a writ of certiorari is appropriate in order to resolve the conflict in the federal courts of appeals over the proper interpretation and application of this Court's holding in *Calder v. Jones*. Specifically, there is a split among the lower federal courts on the issue whether an allegation that the defendants intentionally committed a tort, aimed at plaintiff, a resident of the forum state, with knowledge that the effect of their actions would be felt in the forum state is sufficient to establish personal jurisdiction over the defendants.

In this case the defendants, with the purpose of causing a false conflict of interest between Allred and his client to force Allred out of representation of that client in a suit filed against defendants' clients, filed a frivolous and wholly meritless third party complaint against Allred. They caused process and subsequent discovery to be served on Allred at his office in Jackson, Mississippi. In its decision, the Court of Appeals held that allegations that the defendants had targeted Allred, and intentionally committed the torts of malicious prosecution and abuse of process, with knowledge that their actions would result in injury to Allred in Mississippi, where he lived and worked, were insufficient. The court held that in addition to meeting the "effects" test adopted in *Calder*, a plaintiff must plead facts sufficient to establish that the defendants had purposefully availed themselves of the benefits of Mississippi's laws. This holding is clearly contrary to both the pronouncements of this Court in *Calder* and the interpretations given *Calder* by other courts of appeals.

The Court of Appeals further erred in its interpretation of Mississippi's long-arm statute, by

reading the statute as being narrower in scope than the due process clause allows, a reading that is in direct conflict with the pronouncement of Mississippi's highest court; and by reading the statute as requiring something more than injury in the State of Mississippi.

Respectfully submitted,

s/_____
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Certificate of Service

I hereby certify that a true and coorect copy of the foregoing insturment has been delivered by first class mail on October 18, 1997 upon counsel listed below:

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s/_____
Counsel of Record

United States Court of Appeals,

Fifth Circuit.

No. 96-60083.

MICHAEL S. ALLRED, Plaintiff-Appellant,

v.

MOORE & PETERSON, A Professional Corporation; Gaynell C. Methvin; Mark David; Paul R. Aiello; Camille F. Gravel, Jr., Individual Member of Gravel Brady & Berrigan, a Partnership, Defendants-Appellees.

July 21, 1997.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GARWOOD, DAVIS and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

The issue presented on this appeal is whether the United States District Court for the Southern District of Mississippi had personal jurisdiction over five of the defendants in this diversity abuse of process/malicious prosecution case. The district court dismissed the case on

the grounds that it lacked personal jurisdiction over all the defendants, Moore & Peterson, P.C., a Dallas, Texas law firm, and Paul R. Aiello, Mark David, and Gaynell C. Methvin, Texas residents and former members of Moore & Peterson (collectively the Texas defendants); Gravel, Brady & Berrigan, an Alexandria, Louisiana law firm; James J. Brady, Michael S. Baer, III, Helen G. Berrigan, Camille F. Gravel, Jr., and Charles G. Gravel, Louisiana residents and individual members of Gravel, Brady & Berrigan; and Texas resident Charles C. Rush. Fed.R.Civ.P. 12(b)(2). Plaintiff-appellant Michael S. Allred appealed only the district court's dismissal of appellees the Texas defendants and defendant-appellee Camille F. Gravel, Jr. We affirm the district court's dismissal of the appellees on the grounds that the district court lacked personal jurisdiction.

Facts and Proceedings Below

Plaintiff-appellant Allred is a Mississippi lawyer who filed this suit in state court in Mississippi alleging that various Texas and Louisiana attorneys, during the course of their representation of Charles C. Rush in a suit against Rush pending in the United States District Court for the Middle District of Louisiana, brought a frivolous third-party complaint against Allred, who, at the time, was representing the Louisiana Insurance Commissioner in his capacity as a party in the referenced suit against Rush.

As alleged by Allred, the underlying facts of the current dispute go back almost twenty years to his representation of American Public Life Insurance

Company (APLIC) in 1977 in a suit against Richard O. Rush, Charles C. Rush, and Southern Educators Life Insurance Company (SELIC). According to Allred, this 1977 Mississippi lawsuit involved alleged violations of securities laws and breach of fiduciary duties in the course of dealings between APLIC and SELIC. The parties eventually settled in December 1978 and executed a "Mutual Release and Covenant Not To Sue" in February 1979.

In October 1984, the Insurance Commissioner of Louisiana retained Allred to file suit against Charles C. Rush, among others, on behalf of SELIC, which had been placed in rehabilitation, the Commissioner being the Rehabilitator, and renamed First American Life Insurance Company (FALIC). Allred filed suit in the United States District Court for the Middle District of Louisiana on May 14, 1985, naming numerous defendants.[1] The Louisiana suit charged Rush with fraud, conversion, and breach of fiduciary duty. In April 1986, the defendants-appellees, as attorneys for Rush, filed in the Louisiana suit a third-party complaint naming Rush as third-party plaintiff and APLIC and Allred as third party defendants, alleging breach of the 1979 covenant not to sue, and asserting contribution and indemnification claims for any judgment rendered against Rush. Process on Allred and interrogatories to him were served by being sent certified mail from Dallas, Texas, to Allred's Jackson, Mississippi law

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[1] Sherman A. Bernard, et al. v. Richard O. Rush et al., 641 F.Supp. 730 (M.D.La.1985). An amended complaint was filed on April 10, 1986. Eventually the case involved forty-five named defendants.

offices. Allred subsequently either withdrew or was terminated from his role as attorney for the Louisiana Insurance Commissioner as Rehabilitator of FALIC in the Louisiana suit, allegedly due to the conflict of interest caused by Rush's third-party complaint. The third-party complaint was subsequently dismissed with prejudice when, pursuant to a settlement agreement, Rush assigned the third-party claim to the Rehabilitator of FALIC.

On August 20, 1993, Allred filed the instant suit in the Circuit Court for the First Judicial District of Hinds County, Mississippi, alleging malicious prosecution and abuse of process against Moore & Peterson; the former individual members of Moore & Peterson who represented Rush; Gravel, Brady & Berrigan, Rush's local counsel; and the individual members of Gravel, Brady & Berrigan.[2] Allred's complaint alleged the facts set forth above and asserted that he suffered economic and emotional injury as a result of the third-party claim; specifically, a loss of business income, opportunity, and reputation. The defendants were served by certified mail delivered to them in Texas and Louisiana, respectively. The defendants timely removed the case to the district court below on the basis of diversity of citizenship. 28 U.S.C. § 1332.

On October 8, 1993, the Texas defendants filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) on the ground that service of process by mail on Allred in Mississippi did not establish sufficient

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[2] Final judgment in the Louisiana suit had been entered on March 1, 1993.

contact with Mississippi to allow the district court to exercise personal jurisdiction over the defendants, who were citizens of Texas. On January 14, 1994, defendants Gravel, Brady & Berrigan and its individual members (including defendant-appellee Camille F. Gravel, Jr.), citizens of Louisiana, filed a similar motion to dismiss. The district court heard oral arguments on February 24, 1994 and on March 3, 1994, announced its intention to rule in favor of the defendants on the motions to dismiss. Allred, on September 26, 1994, filed a motion for leave to amend his complaint to add a conspiracy claim pursuant to Rule 15(a). On September 30, 1994, without ruling on Allred's motion to amend, the district court issued a final order of dismissal for lack of personal jurisdiction.(3) Allred filed a timely "Motion To Reconsider" pursuant to Rules 59 and 60 on the grounds that the district court failed to consider his pending motion to amend. The district court, construing Allred's motion as a motion to alter or amend the judgment under Rule 59(e), found that the amended complaint did not allege that any conspiratorial events took place in Mississippi and that the amended complaint relied on precisely the same basis as the earlier complaint--namely, that the service of process by certified mail in Mississippi was sufficient to establish personal jurisdiction. Accordingly, the district court denied Allred's Rule 59(e) motion on January 9, 1996. Allred filed a timely notice of appeal.[3]

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[3] Allred does not appeal the district court's dismissal of Gravel, Brady & Berrigan, Charles C. Rush, James J. Brady, Michael S. Baer, III, Helen G. Berrigan, or Charles G. Gravel.

Discussion

Allred's sole contention on appeal is that the district court erred in holding it lacked in personam jurisdiction over the Texas defendants and Camille F. Gravel, Jr.

A district court's dismissal for want of personal jurisdiction pursuant to Rule 12(b)(2) is subject to de novo review. Jobe v. ATR Mktg., Inc., 87 F.3d 751, 753 (5th Cir.1996); Wilson v. Belin, 20 F.3d 644, 647-48 (5th Cir.), cert. denied, 513 U.S. 930, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994). "When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident. The court may determine the jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir.1985) (citing Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir.1985); Washington v. Norton Mfrg. Inc., 588 F.2d 441, 443 (5th Cir.), cert. denied, 442 U.S. 942, 99 S.Ct. 2886, 61 L.Ed.2d 313 (1979)); see also Jobe, 87 F.3d at 753.

A federal district court sitting in diversity may exercise personal jurisdiction only to the extent permitted a state court under applicable state law. Cycles, Ltd. v. W.J. Digby, Inc., 889 F.2d 612, 616 (5th Cir.1989); Rittenhouse v. Mabry, 832 F.2d 1380, 1382 (5th Cir.1987). "The state court or federal court sitting in diversity may assert jurisdiction if: (1) the state's long-arm statute applies, as interpreted by the state's

courts; and (2) if due process is satisfied under the fourteenth amendment to the United States Constitution." Cycles, 889 F.2d at 616 (citing DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1265 (5th Cir.1983)); see also Jobe, 87 F.3d at 753; Rittenhouse, 832 F.2d at 1382; Stuart, 772 F.2d at 1189.

It is undisputed that none of the appellees are or were ever residents or citizens of Mississippi; the Texas defendants were at all relevant times residents and citizens of Texas, and appellee Gravel was at all relevant times a citizen and resident of Louisiana. None of the appellees had an agent for service of process in Mississippi, or engaged in business (or had any permit to do so), or practiced law (or was licensed to do so), in Mississippi; none represented parties in litigation in Mississippi; none owned or leased property, or had any employees, offices, bank accounts or telephone listings there, or advertised or solicited business there. None traveled to Mississippi on a regular basis. The only relevant conduct or connection on the part of appellees related to Mississippi is the mailing from Dallas, Texas, to Allred's Jackson, Mississippi law office of the third party complaint and summons, and interrogatories, in the lawsuit pending in the Middle District of Louisiana in which Allred was counsel for the plaintiff, the Louisiana Commissioner of Insurance.

I. The Mississippi Long-Arm Statute

On appeal, Allred relies exclusively on the tort prong of the Mississippi long-arm statute to support the exercise of jurisdiction by the district court over the appellees.[4]

The Mississippi long-arm statute is not coextensive with federal due process, requiring an analysis of the scope of the reach of the statute itself. See Cycles, 889 F.2d at 616-17 (noting that the Mississippi long-arm statute has a "relatively restrictive scope"); Rittenhouse, 832 F.2d at 1383 (same).

Under the tort prong of the Mississippi long-arm statute, personal jurisdiction is proper if any element of the tort (or any part of any element) takes place in Mississippi. See, e.g., Smith v. Temco, 252 So.2d 212, 216 (Miss.1971); Western Chain Co. v. Brownlee, 317 So.2d 418, 421 (Miss.1975); Rittenhouse, 832 F.2d at 1384; Jobe, 87 F.3d at 753; Cycles, 889 F.2d at 619. As the Mississippi Supreme Court has observed consistently:

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[4] Mississippi's long-arm statute provides in relevant part:

> "Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state." Miss.Code Ann. § 13-3-57 (1996 Supp.) (emphasis added).

"The tort is not complete until the injury occurs, and if the injury occurs in this State then, under the ... statute, the tort is committed, at least in part, in this State, and personam jurisdiction of the nonresident tort feasor is conferred upon the Mississippi court." Temco, 252 So.2d at 216; see also Anderson v. Sonat Exploration Co., 523 So.2d 1024, 1025 (Miss.1988).

Our cases, however, have been careful to distinguish actual injury from its resultant consequences. "[C]onsequences stemming from the actual tort injury do not confer personal jurisdiction at the site or sites where such consequences happen to occur." Lobe, 87 F.3d at 753 & n. 2 (observing that "[t]he term "injury' commonly denotes the invasion of any legally protected interest of another" whereas "the term "damage' is understood to mean the harm, detriment or loss sustained by reason of an injury"); see also Cycles, 889 F.2d at 619 ("We have held that with respect to Mississippi's long-arm statute a tort occurs where and when the actual injury takes place, not at the place of the economic consequences of the injury."); Rittenhouse, 832 F.2d at 1384 (same); Estate of Portnoy v. Cessna Aircraft Co., 730 F.2d 286, 290 (5th Cir.1984) (same).

At the outset, we reject Allred's reliance on Hyde Construction Co. v. Koehring, 321 F.Supp. 1193 (S.D.Miss.1969), for the proposition that "service of process on Allred in Mississippi constituted the commission of a tort in Mississippi for purposes of satisfying the requirements of the Mississippi long-arm statute." Although the district court in Hyde, examining section 13-3-57's statutory predecessor, acknowledged that the abuse of process tort must "accrue" within the

geographical limits of Mississippi and so found, it nevertheless repeatedly emphasized what we think to have been the determinative factor in its analysis: the defendant in the abuse of process action had "domesticated itself or qualified to do business within the State of Mississippi having appointed ... [a] registered agent for service of process between [all relevant dates]." Hyde, 321 F.Supp. at 1210 (noting that the defendant corporation "was authorized to transact business in Mississippi"). Allred neither argued nor presented evidence that any defendant had any contact whatsoever with Mississippi other than the service of process by certified mail from Dallas, Texas to his Jackson, Mississippi law office. To the extent that Hyde supports Allred's questionable proposition, it must be limited to the case of a person or entity subject to the general jurisdiction of the Mississippi courts.

A. Malicious Prosecution

In Mississippi, malicious prosecution requires:

> "(1) the institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the instance of the defendants; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause in the proceedings; and (6) the suffering of damages as a result of the action or prosecution complained of." Mississippi Road Supply Co. v. Zurich-American Ins. Co., 501 So.2d 412, 414 (Miss.1987) (citing Harvill v. Tabor, 240 Miss. 750, 128 So.2d 863, 864 (1961)).

Allred does not contend that elements two through five of the tort of malicious prosecution occurred in Mississippi. Rather, Allred argues primarily that his economic, reputational, and emotional "injuries" set forth in his affidavit were suffered in Mississippi and, therefore, support jurisdiction under the tort prong. Appellees concede that the damages Allred alleges may have occurred in Mississippi, but argue that damages, alone, are insufficient to support personal jurisdiction under the Mississippi long-arm statute. Appellees are correct.

As discussed above, this Circuit has recognized consistently that Mississippi does not permit damages to serve as a proxy for injury in the personal jurisdiction calculus. The concepts are distinct and we must endeavor not to conflate the existence of an injury--and hence the completed tort--with the presence of its economic consequences. See Jobe, 87 F.3d at 753 (noting that, especially in a commercial tort situation, collateral consequences can be quite far-reaching). The injury suffered in a malicious prosecution tort is the institution of criminal or civil proceedings where the institution ought not to have occurred (and occurred for an improper reason). Allred's damages-qua-injury argument for personal jurisdiction under the Mississippi long-arm statute flies in the face of our rather clear guidance in Jobe, Cycles, Rittenhouse, and Portnoy.

Allred has alleged no facts that support the exercise of personal jurisdiction through the use of the Mississippi long-arm statute over his malicious prosecution claim. Allred's insistence that the service of process by certified mail from out of state can support jurisdiction under the first element of the malicious prosecution tort is

misplaced. Service of process on Allred in Mississippi was not a prerequisite to the institution of judicial proceedings against him in the Louisiana suit. A lawsuit is commenced under the federal rules when the complaint is filed. Fed.R.Civ.P. 2 ("There shall be one form of action to be known as "civil action'."); Fed.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court."). In Louisiana, the filing of a lawsuit both commences the action and tolls the statute of limitation. See La.Code Civ. Proc. Ann. art. 421 (West 1960)("A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction."); La. Civ.Code Ann. art. 3463 (West 1994) ("An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending."); accord Segura v. Frank, 630 So.2d 714, 727(La.), cert. denied, 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). Even in Mississippi, Allred's preferred forum, it is the filing of a lawsuit--and not the service of process--that is the determinative event in the commencement of a lawsuit. See M.R.C.P. 3(a) ("A civil action is commenced by filing a complaint with the court."); Watters v. Stripling, 675 So.2d 1242, 1244 (Miss.1996); Erby v. Cox, 654 So.2d 503, 505 (Miss.1995) ("[D]oes the simple filing of the complaint without process being issued toll the statute of limitations? We answer in the affirmative."). Stated simply, the injury that Allred complained of in his malicious prosecution claim was the filing of the Louisiana lawsuit, not the subsequent service of process. We have neither found, nor been cited to, any relevant Mississippi authority that supports the proposition that

service of process is a necessary element of the malicious prosecution tort in Mississippi.

B. Abuse of Process

In Mississippi, the elements of abuse of process are:

> "(1) the party made an illegal use of the process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of process." McLain v. West Side Bone & Joint Ctr., 656 So.2d 119, 123 (Miss.1995) (citing Foster v. Turner, 319 So.2d 233, 236 (Miss.1975)).

For the reasons discussed above, we reject Allred's contention that he can bootstrap his alleged damages incurred in Mississippi into an injury to achieve personal jurisdiction over his abuse of process claim for the purposes of the Mississippi long-arm statute. Furthermore, as is readily apparent from the above quoted excerpt, the abuse of process tort, in Mississippi as elsewhere, involves the corruption of process--not merely the issuance of process simpliciter.

The Mississippi Supreme Court has acknowledged that the abuse of process tort does not address the case, as here, where the only alleged abuse of process was the service of a summons without any corruption or impropriety:

> "What defendant complains of in his counterclaim is not based on any perversion of any process, but simply the filing of the suit.... Nothing unlawful was done under any process. It

> cannot be argued that the process of the court was abused by accomplishing a result not commanded by it or not lawfully obtainable under it when the only process involved was the simple summon to defend the suit." Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So.2d 171, 175 (1957); see also Foster, 319 So.2d at 235 ("[Abuse of process requires a]n ulterior purpose, and the perversion of the process after its issuance so as to accomplish a result not commanded by it or not lawfully obtainable under it.") (citing Edmonds, 93 So.2d at 174).

In Brown v. Edwards, 721 F.2d 1442, 1454 (5th Cir.1984), this Court also addressed the point that Allred misunderstands concerning the abuse of process tort. After considering the Restatement 's description of the elements of the abuse of process tort, we favorably quoted the comment:

> " "The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process ... constitutes the

> misconduct for which the liability is imposed....' " Brown, 721 F.2d at 1454-55 (quoting Restatement (Second) of Torts § 682 cmt. a (emphasis in Brown)).

Prosser and Keeton on Torts speaks even more directly to the question of whether the mere service of process--without any allegation that the service of process itself was somehow perverted--constitutes an element of abuse of process:

> "The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.... There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Prosser and Keeton on Torts 898 (5th ed.1984) (emphasis added); see also Brown, 721 F.2d at 1455 (same).

Accordingly, because the only activity alleged by Allred to have taken place within Mississippi was the service of process by certified mail from Texas to his Mississippi law office--an event which is simply not an element (or part of an element) of the tort of abuse of process--we

hold that Allred failed to allege any facts that would support personal jurisdiction over the defendants under the tort prong of the Mississippi long-arm statute.

Allred's reliance on Simon v. United States, 644 F.2d 490 (1981), is similarly misplaced. Simon, unlike the facts here presented, involved allegations of corrupt and perverted abuse of process by the defendant within the forum state. In Simon the abuse of process defendant deliberately had issued a subpoena containing Simon's incorrect name and address in Louisiana. Id. at 492. As a result of the defendant's misrepresentation, Simon was unable to be served in Louisiana. Id. The defendant, however, informed the federal district court judge in Georgia that Simon had in fact been served and the judge subsequently caused a "subpoena ticket" to be issued in Louisiana. Id. United States marshals subsequently served Simon personally in Louisiana, who left for Georgia the next day. Id. Upon his arrival in Georgia, Simon was immediately arrested. Id.

Although the Simon defendant's activities within the forum state were quite limited, we find it significant that, unlike here, the service of process by the federal marshals in Louisiana resulted directly from the defendant's "intentional misuse of process"--i.e., lying to the federal judge to cause the subpoena to issue and then lying again about whether Simon had in fact been served--and not merely the proper service of a defendant for purportedly improper motives. Here, the service of process was entirely proper and in accordance with the applicable rules.

In summary, we hold that Allred failed to allege that any element of the abuse of process tort occurred in

Mississippi: (1) to the extent that the tort requires corruption or perversion of process, neither has been alleged, and (2) to the extent that the tort requires an improper motive, it is uncontroverted that all decisions regarding the third-party complaint were made in either Louisiana or Texas. Accordingly, we find that the district court appropriately determined that Allred failed to establish the proper jurisdictional prerequisites to support the exercise of personal jurisdiction under the Mississippi long-arm statute.[5]

II. Due Process

Even were we to accept Allred's arguments concerning the operation of the Mississippi long-arm statute, we are nevertheless convinced that the exercise of personal jurisdiction by the district court in Mississippi would violate due process.

The constitutional limitations on the reach of the personal jurisdiction of a court are now quite familiar. The exercise of personal jurisdiction over a nonresident defendant comports with due process principles only

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[5] We are also in complete agreement with the district court that Allred's attempt to add an "allegation of conspiracy to the complaint attaches no additional merit to the assertion that the defendants' mere service of process on the plaintiff by mail in a Louisiana lawsuit was sufficient to establish in personam jurisdiction in Mississippi." Like his original complaint, his amended complaint also fails to allege any conspiratorial agreements or acts took place in Mississippi.

when two requirements are met. First, the nonresident defendant must have "purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts' with that forum state." Felch v. Transportes Lar-Mex, Sa De CV, 92 F.3d 320, 323 (5th Cir.1996) (citing Wilson v. Belin, 20 F.3d 644, 647 (5th Cir.), cert. denied, 513 U.S. 930, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994); International Shoe Co. v. Washington, 326 U.S. 310, 315-17, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-77, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). Second, the exercise of personal jurisdiction over the nonresident defendant "must not "offend "traditional notions of fair play and substantial justice." ' " Felch, 92 F.3d at 323 (quoting Wilson, 20 F.3d at 647; Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113-15, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987)).

This Court recently summarized the minimum contacts inquiry as follows:

> "The "minimum contacts' prong of the inquiry may be further subdivided into contacts that give rise to "specific' personal jurisdiction and those that give rise to "general' personal jurisdiction. Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. General jurisdiction, however, will attach, even if the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts with the forum state are both "continuous and systematic.' " Wilson, 20 F.3d at

647 (citing Helicopteros Nacionales de Colombia, SA v. Hall, 466 U.S. 408, 413-16, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 nn. 8-9 (1984)).

Only if the nonresident defendant has sufficient minimum contacts with the forum state will the fairness of the exercise of personal jurisdiction be evaluated.[6]

The attorney appellees' contacts with Mississippi do not remotely approach the level required to support general jurisdiction, and Allred does not contend otherwise. Rather, Allred maintains that specific jurisdiction is appropriate because the causes of action--malicious prosecution and abuse of process--are directly related to appellees' contacts with Mississippi. In support of his position, Allred cites a number of defamation cases permitting the exercise of specific jurisdiction upon the existence of a single, purposeful contact with the forum state. See, e.g., Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); Brown v. Flowers Indus.,

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[6] "The fairness prong for personal jurisdiction requires federal courts to consider (1) the burden upon the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in securing relief; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies'; (5) "the shared interest of the several States in furthering fundamental substantive social policies.' " Bullion v. Gillespie, 895 F.2d 213, 216 n. 5 (5th Cir.1990) (citing Asahi, 480 U.S. at 113-15, 107 S.Ct. at 1033 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288-90, 100 S.Ct. 559, 563, 62 L.Ed.2d 490 (1980))).

Inc., 688 F.2d 328 (5th Cir.1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983).

We are not persuaded that the defamation cases present an appropriate line of precedent for Allred. In the defamation cases cited by Allred, the allegedly tortious acts--the publication of defamatory statements--were expressly aimed at the forum state and the nonresident defendants knew that their acts would have an impact on the plaintiff in the forum state. See, e.g., Calder, 465 U.S. at 787-90, 104 S.Ct. at 1486-87 (allegedly libelous article about plaintiff's drinking habits published in 604,000 copies of the National Enquirer sold in the forum state); Brown, 688 F.2d at 333 (single, defamatory telephone call directed at the forum state). The service of process here, however, is qualitatively different than the publication of a defamatory statement or article. In our view, it is simply not a part of either Mississippi's malicious prosecution or abuse of process tort; and, even if it were, it would constitute only the smallest portion of one element of the claim. This is not the case with the publication element of a defamation tort. That the "effects" test of Calder applies outside of the defamation context is clear; but the effects test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state. Any publication in this case occurred in Louisiana, upon the filing in the federal court there of the third party complaint, a public document. There was no publication in Mississippi, the process and complaint simply arrived at Allred's office there by mail in an envelope addressed to him. Any "effects" in this case are essentially the effects of being sued in the Louisiana case, and it is immaterial to these effects when, where or

how service was affected (unlike the relation between the "effects" of a libel and the place of its publication).

We agree with the Seventh Circuit's pronouncement that:

> "The Supreme Court did not intend the Calder "effects' test to apply only to libel cases. However, the "effects' of the intentional tort of libel in the forum state (i.e., the plaintiff's residence) are perhaps more pronounced than the "effects' of most other intentional torts. Nevertheless, the key to Calder is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum. Whether these effects, either alone or in combination with other contacts, are sufficient to support in personam jurisdiction will turn upon the particular facts of each case." Wallace v. Herron, 778 F.2d 391, 395 (7th Cir.1985), cert. denied, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986).

The defendants' contacts with Mississippi fall far short of the minimum contacts mark.

Allred's arguments notwithstanding, we agree with the district court and the appellees that Wallace presents a factually indistinguishable case. In Wallace, an Indiana resident sued in Indiana a California law firm and three of its attorneys for malicious prosecution in connection with a lawsuit defendants had filed in California. Wallace, 778 F.2d at 392. Only one of the California defendants had even been to Indiana (to take a

deposition in an unrelated case). Id. at 394. Wallace, the plaintiff, argued that the defendants' service in Indiana of interrogatories and discovery requests provided sufficient minimum contacts to comport with due process. Id. The Seventh Circuit affirmed the district court's dismissal for lack of sufficient minimum contacts with the Indiana forum.

As in Wallace, the defendants in the present suit caused process to be served by mail on Allred on behalf of their clients in Louisiana federal district court pursuant to a federal lawsuit in Louisiana. No other contacts with Mississippi have been alleged. It would indeed be unreasonable to require defendants to appear in Mississippi to defend this suit on the basis of such attenuated contacts. See id. at 395 ("The defendants filed these papers on behalf of their California clients in a California court pursuant to a California lawsuit.... [Defendants] took no action that created the necessary connection with Indiana for them to reasonably anticipate being haled into court there.").

Accordingly, we hold that where process is issued in a Louisiana lawsuit and is properly served in Mississippi on a Mississippi resident by mailing from outside of Mississippi, such service--absent any other Mississippi nexus--provides insufficient contact with Mississippi to support the exercise of personal jurisdiction by a Mississippi court over non-residents served outside of Mississippi under the constraints of the due process clause.

Conclusion

Because the district court properly held it lacked authority under the Mississippi long-arm statute to exercise personal jurisdiction over the defendants-appellees and because the exercise of personal jurisdiction by the Mississippi federal district court would, in any event, be improper under the due process clause, the district court's judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:93-CV-615WS

MICHAEL S. ALLRED
PLAINTIFF

v.

MOORE & PETERSON, A PROFESSIONAL CORPORATION; GAYNELL C. METHVIN, MARK DAVID, AND PAUL AIELLO, INDIVIDUALLY; GRAVEL, BRADLY & BERRIGAN, A PARTNERSHIP, and THE NAMED INDIVIDUAL MEMBERS THEREOF;

AND CHARLES RUSH, INDIVIDUALLY
DEFENDANTS

MEMORANDUM OPINION AND ORDER

This case came before the court on an earlier date pursuant to the motions of the Texas and Louisiana defendants in the above styled and numbered cause to dismiss the plaintiff's complaint for lack of in personam jurisdiction in accordance with Rule 12(b)(2) of the Federal Rules of Civil Procedure.[1] Defendants argued

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[1] Rule 12(b)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,

persuasively that their contacts with Mississippi were not sufficient to justify the instant litigation against them. This court entered a "Final Order of Dismissal" for lack of in personam jurisdiction on September 30, 1994, fully and finally dismissing the plaintiff's complaint. However, on September 26, 1994, the plaintiff moved to amend his complaint. After this court's Final Order of Dismissal was entered, the plaintiff filed a "Rules 59 and 60 Motion to Reconsider Order Dismissing Complaint." The defendants responded that the plaintiff's motion was untimely served and should be dismissed on that basis. This court has reviewed the plaintiff's motion to reconsider and his motion to amend the complaint and hereby determines that the amended complaint adds nothing upon which this court may predicate in personam jurisdiction over the named defendants.

THE FINAL ORDER OF DISMISSAL

The parties have treated this court's Final Order of Dismissal entered September 30, 1994, as a final judgment on the issue of jurisdiction. This court agrees that the Final Order of Dismissal was intended to fully and finally dispose of the case in the same manner as a final judgment on the issue of in personam jurisdiction. It is well established that a district court has jurisdiction to determine whether its own jurisdiction over a matter exists. See United States v. United Mine Workers of America, 330 U.S. 252, 67 S.Ct. 677, 695 n.57, 91 L.Ed.

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counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(2) lack of jurisdiction over the person,

884 (1947), citing Carter v. United States, 135 F.2d 858, 861 (5th Cir. 1943) (a court has jurisdiction to determine its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged): see also Wickham v. Hall, 706 F.2d 713, 718 (5th Cir. 1983) (citing Carter and United Mineworkers).

In the instant case, this court determined that it lacked in personam jurisdiction over the defendants. So, based on this finding, this court could enter no order other than one fully and finally dismissing the plaintiff' complaint. There could be no judgment on the merits of the plaintiff's claims. See Curtis v. Taylor, 625 F.2d 645 (5th Cir. 1980), citing Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939, 943 (1946) (whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy) .

Therefore, this court finds that its Final Order of Dismissal fully and finally disposed of this case on the issue of in personam jurisdiction and is a final adjudication.

IS THE PLAINTIFF'S MOTION SUBMITTED UNDER RULE 59 OR RULE 60?

Whether this court treats the motion under Rule 59(e)[2] or Rule 60(b)[3] depends on the time at which the motion is served.

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[2] Rule 59(e) of the Federal Rules of Civil Procedure provides that a "motion to alter or amend the judgment shall be

If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b). Lavespere v. Niagara Mach. & Tool Works. Inc., 910 F.2d 167, 173 (5th Cir. 1990); Harcon Barge Co.. Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665, 667 (5th Cir. 1986). In the instant case, if the plaintiff's motion was served within ten days after this court entered its Final Order of Dismissal, then the plaintiff's motion must be considered as a motion to alter or amend judgment under Rule 59(e).[4]

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served not later than 10 days after entry of the judgment."

[3] Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part that,

[o)n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[4] The Federal Rules of Civil Procedure do not specifically provide for a "motion for reconsideration." See Lavespere v. Niagara Mach. & Tool Works. Inc., 910 F.2d 167, 173 (5th Cir. 1990). The Fifth Circuit Court has held, however, that such a motion which challenges the prior judgment on its merits will be

IS THE RULE 59(e) MOTION TIMELY SERVED?

The Texas and Louisiana defendants argue that the plaintiff's motion to reconsider is a Rule 59(e) motion which was untimely served. Defendants contend that the plaintiff had until October 10, 1994, ten days after entry of this court's Final Order of Dismissal on September 30, 1994, to serve a Rule 59 motion. However, say defendants, plaintiff's motion was served on October 14, 1994. Thus, defendants submit, the plaintiff's Rule 59 motion should be dismissed because it was served four days too late.

This court's judgment is dated September 30, 1994. The plaintiff served his Rule 59 motion by mail on October 14, 1994. Under Rule 59(e), a motion to amend must be "served" not later than ten days after entry of judgment. Service of pleadings subsequent to the original complaint, with exceptions not here relevant, may be made upon an opposing attorney "by mailing it to him at his last known address . . . . Service by mail is complete upon mailing." See Rule 5(b) of the Federal Rules of Civil Procedure; *In* Re Todd Corporation, 662 F.2d 339 (5th Cir. 1981) (in accordance with Rule 5(b), a Rule 59(e) motion must be served no later than 10 days after entry of judgment, and service is complete on mailing) .

The date of service of a motion to amend the judgment within the meaning of Rule 59(e) is the date upon which the moving party certifies, without contest by the non-moving parties, that the motion was mailed

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treated as either a motion "to alter or amend" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b). Id.

to opposing counsel. Clayton v. Douglas, 670 F.2d 143, 144 (10th Cir.), cert. denied, 457 U.S. 1109, 102 S.Ct. 2911, 73 L.Ed.2d 1319 (1982); 11 Wright and Miller, Federal Practice and Procedure, e 2812 n. 48, e 2817 n. 24-26. Weekends and holidays are excluded from the calculation when determining whether a Rule 59(e) motion was served within ten days of the judgment. See Rule 6(a) of the Federal Rules of Civil Procedure and Richardson v. Oldham, 12 F.3d 1373, 1377 n.9 (5th Cir. 1994).

Calculating timely service of the Rule 59 motion in the instant case, this court finds that its judgment was entered on Friday, September 30, 1994, the day of the act or event from which the ten-days period begins to run. This day is not included in the calculation. RTC v. Holmes, 846 F.Supp. 1310 (S.D. Tex. 1994) (in computing this time the court excludes the entry date from consideration and excludes intermediate holidays and weekends whenever a rule establishes a time period of less than 11 days, citing Rule 6(a)). Thus, the first day of the ten-days period began on Monday, October 3, 1994. Ordinarily, the last day of the ten-days period would have been Friday, October 14, 1994. However, inasmuch as October 10, 1994, was Columbus Day, a legal holiday under Rule 6(a), the tenth day of the ten-days period was extended to Monday, October 17, 1994. Therefore, the plaintiff's Rule 59 motion was timely served when it was mailed on October 14, 1994.[5]

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[5] A Rule 59 motion must be filed "within a reasonable time" after service. See Rule 5(d) of the Federal Rules of Civil Procedure. The Fifth Circuit has concluded that Rule 59(e) applies to the time of service, not to the time of filing. Allen v. Ault, 564 F.2d 1198, 1199 (5th Cir. 1977). The time of filing, says the Fifth Circuit, is governed by Rule 5(d) of the Federal

PLAINTIFF'S MOTION TO "RECONDISDER" UNDER RULE 59(e)

The plaintiff asks this court to reconsider dismissal of his complaint because his "Motion to Amend Complaint" was pending at the time this court entered its Final Order of Dismissal. This motion was dismissed by the United States Magistrate Judge on August 22, 1994, due to the plaintiff's failure to follow the Uniform Local Rules of this court. However, the Magistrate Judge allowed the plaintiff to resubmit his motion in the proper form and the plaintiff did so on September 26, 1994. Then, this court's Final Order of Dismissal was entered four days later. Consequently, the plaintiff believes his case has not received a full hearing and he asks this court to reconsider its order of dismissal in light of his motion to amend his complaint.

PLAINTIFF'S ASSERTIONS IN HIS COMPLAINT AND HIS FIRST AMENDED COMPLAINT

In the plaintiff's original complaint, all of the alleged tortious activity occurred in the State of Louisiana. The only activity to occur in Mississippi was actual service of a summons and a third-party complaint on the plaintiff Allred by certified mail in Mississippi. The defendants served this summons after filing their

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Rules of Civil Procedure. Id., at 1199, citing Sadowski V. Bombardier Ltd., 527 F.2d 1132 (7th Cir. 1975); Claybrook Drilling Co. v. Divanco. Inc., 336 F.2d 697 (10th Cir. 1964); 2 Moore's Federal Practice, P 5.10, p. 1381 (2d ed. 1977); 11 Wright & Miller, Federal Practice and Procedure:Civil Sec. 2812 n. 47 (1973). See Vincent v. Consolidated Operating Company, 17 F.3d 782 (5th Cir. 1994) (a Rule 59 motion is

third-party complaint in a Louisiana action filed against the plaintiff Allred. Although the summons was served on the plaintiff in Mississippi, the summons directed the plaintiff to appear and defend in a Louisiana court. After the plaintiff submitted his answer in the Louisiana litigation, the third-party complaint against the plaintiff was dismissed. Thereafter, plaintiff filed the instant lawsuit charging the defendants with malicious prosecution and claiming personal jurisdiction over the defendants in Mississippi.

The plaintiff attempts to forge *a* nexus between Mississippi and the defendants' service of the third party complaint in the Louisiana action, arguing that this service of process was part of the tort of abuse of process and thus was related to the plaintiff's claim of malicious prosecution. Hence, says plaintiff, the very service of process itself is sufficient to bring the defendants within the purview of Miss. Code Ann. Sec. 13-3-57[6]

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[6] After July 1, 1991, Miss. Code Ann. Sec. 13-3-57 provides in pertinent part:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process on the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure .

(Mississippi's long-arm jurisdiction statute) and satisfy the requirements of due process.

In his First Amended Complaint, the plaintiff attempts to alloy the metal of his malicious prosecution claim with allegations of conspiracy. By adding the conspiracy claim, plaintiff says his complaint is able to leap any jurisdictional hurdles. However, the amended complaint does not say that any conspiratorial acts took place in Mississippi. Instead, the First Amended Complaint still attempts to cross into Mississippi via the same bridge, service of the summons and complaint on the plaintiff Allred via mail. This court is unpersuaded. Adding the allegation of conspiracy to the complaint attaches no additional merit to the assertion that the defendants' mere service of process on the plaintiff by mail in a Louisiana lawsuit was sufficient to establish in personam jurisdiction in this Mississippi case over the defendants.

CONSPIRACY IN MISSISSIPPI AND PLAINTIFF'S BURDEN OF PROOF

Mississippi recognizes a cause of action for conspiracy and has held that it "is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." See Shaw v. Burchfield, 481 So.2d 247, 255 (Miss. 1985); and N.A.A.C.P. v. Claiborne Hardware Co., 393 So.2d 1290, 1301 (Miss. 1980). Mississippi's long-arm statute requires that part of this tort must have been committed by the defendants in Mississippi. The Mississippi

Supreme Court has interpreted the tort prong of the Mississippi long-arm statute to mean that Mississippi will extend personal jurisdiction to a nonresident who commits any PART of a tort in Mississippi. See Smith v Temco. Inc., 252 So.2d 212, 216 (Miss. 1971). So, the plaintiff is required to show that the defendants conspired at least in part in Mississippi to maliciously prosecute him. However, a close examination of the plaintiff's Complaint and his First Amended Complaint reveals that he has failed to allege that any conspiratorial acts were committed in Mississippi.

CAN BERVICE OF BUMNONS BE CONSTRUED AS A SEPARATE TORT?

Under Mississippi law, the mere issuance of a summons to defend a lawsuit does not constitute abuse of process (or any other tort). Edmonds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So.2d 171, 174 (1957). The tort of abuse of process requires a showing of (1) some ulterior purpose, (2) malicious perversion of process to obtain a result not lawfully warranted or properly attainable, and (3) damages resulting from the abuse. Enlow v. Tishomingo County, Mississippi, 962 F.2d 501 (5th Cir. 1992). Typical of the cases where the action of abuse of process will lie is where a person has been arrested or property has been seized in order to extort payment of money. Edmonds v. Delta Democrat Publishing Co., 93 So.2d at 175. A simple summons to defend a lawsuit will not support a charge of abuse. Id. Something else must occur before a cause of action will arise under Mississippi law. All that the plaintiff in the instant case can assert is that he received a complaint and

summons pursuant to a third party action which was subsequently dismissed, nothing more.

WHERE DID THE ALLEGED TORT(S) OCCUR?

In both his Complaint and his First Amended Complaint, the plaintiff says that the defendants' service of a summons and complaint on the plaintiff by mail in Mississippi constitutes part of the tort of abuse of process. This court disagrees and is persuaded that if any tort has been asserted by the plaintiff, it occurred in its entirety where and when the defendants' third party complaint was filed and pursued -- Louisiana.

The Fifth Circuit has noted that for purposes of personal jurisdiction, "a tort occurs when and where the actual injury or accident takes place." Cycles. LTD. v. W.J. Digby. Inc., 889 F.2d 612, 619 (5th Cir. 1989) (holding that the tort of con-version was complete where unlawful dominion was exercised, not where the economic consequences were suffered); Rittenhouse v. Mabry, 832 F.2d 1380, 1384 (5th Cir. 1987) (medical malpractice occurred where the operation was conducted, not where the pain was suffered); Estate of Portnoy v. Cessna Aircraft Corporation, 730 F.2d 286, 290 (5th Cir. 1984) (tort of negligence occurred where plane crashed, not in Mississippi where economic consequences occurred).

Similarly, the entire tort of which the plaintiff complains was established in its entirety in Louisiana where the third-party complaint was filed. Notice of that filing and the summons to appear and defend was an integral part of the defendants' Louisiana activity. The summons was issued in Louisiana. While the plaintiff's alleged damages -- pain and suffering, humiliation, loss of

income, reputation damage, and loss of good will -- all may have occurred in Mississippi, all were merely consequential to the actions of the defendants in Louisiana. In keeping with the rationales of Cycles, Rittenhouse, and Estate of Portnoy neither the economic consequences of tortious activity nor the pain, suffering and humiliation precipitating therefrom may form the basis for long-arm jurisdiction in Mississippi. Cycles, at 619.

CONCLUSION

The plaintiff's pending motion to amend his complaint adds nothing which has not been considered already by this court. For the reasons above stated, this court is of the considered opinion that plaintiff's mere inclusion of a claim of conspiracy still does not establish that any tortious activity took place in Mississippi. Thus, this court hereby denies Allred's "Rules 59 and 60 Motion to Reconsider."

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

MICHAEL S. ALLRED
PLAINTIFF

v.

MOORE & PETERSON, A PROFESSIONAL CORPORATION; GAYNELL C. METHVIN, MARK DAVID, AND PAUL AIELLO, INDIVIDUALLY; GRAVEL, BRADLY & BERRIGAN, A PARTNERSHIP, and THE NAMED INDIVIDUAL MEMBERS THEREOF; AND CHARLES RUSH, INDIVIDUALLY
DEFENDANTS

COMPLAINT

For cause of action, Plaintiff alleges:

I. PARTIES

1. Plaintiff, Michael S. Allred, is an individual adult resident citizen of Mississippi.

2. Defendant, Moore & Peterson, was on relevant occasions, and still is, a professional corporation existing pursuant to Texas law the principal address of which is 7557 Rambler Road, Suite 7, Dallas, Texas 75231.

3. In July, 1986, when certain actions complained of herein occurred, Gaynell C. Methvin, Mark David and

Paul R. Aiello were members or associates of Moore & Peterson, a professional corporation.

(a) Paul R. Aeillo, Esquire, is an individual resident citizen of the State of Florida, whose address for service of process is Broad & Cassel, 175 Northwest First Avenue, Suite 2000, Miami Florida 33128;

(b) Gaynell C. Methvin, Esquire, is an individual resident citizen of the State of Texas, whose address for service of process is Johnson & Gibbs, 900 Jackson, Suite 100, Dallas, Texas 75202; and

(c) Mark David, Esquire, is an individual resident citizen of the State of Texas, whose address for service of process is 2613 Clublake Trail, McKinney, Texas 75070.

4. Moore & Peterson and the three named individuals are individually, jointly, severally and alternatively liable for the actions of Moore & Peterson and its associated lawyers for the causes of action alleged herein.

5. Defendant, Gravel, Brady & Berrigan, is, upon information and belief, a general partnership existing pursuant to Louisiana law the principal address of which is 711 Washington Street, Post Office Box 1792, Alexandria, Louisiana 71309.

6. In July, 1986, when certain actions complained of herein occurred, the members of Gravel, Brady & Berrigan were, upon information and belief:

(a)Camille F. Gravel, Jr.;
(b)James J. Brady;

(c)Michael S. Baer, III;
(d)Helen G. Roberts (now Helen G. Berrigan); and
(e)Charles G. Gravel.

Said individuals may be served with process at the usual address of Gravel, Brady & Berrigan which is 711 Washington Street, Post Office Box 1792, Alexandria, Louisiana 71309, with the exception of Michael S. Baer, III, who may.' be served at his business address, which is 780 North Street, Baton Rouge, Louisiana.

7. All of the above-named persons were, at relevant times, members of a partnership or other unincorporated association which is subject to suit under a common name," within the meaning of Mississippi Rules of Civil Procedure 4(d)(4).

8. Defendant Charles C. Rush, is an individual adult resident citizen of Texas whose address is believed to be: (1) 8888 Park Lane, Dallas, Texas; or (2) 5129 Radbrook, Dallas, Texas.

II. PROCESS AND SERVICE OF PROCESS

9. The Defendant partnership and individuals are amenable to process and service of process returnable to this Court in that said Defendants committed torts in whole or in part within the State of Mississippi as particularized herein below. The Defendants are served with a summons and complaint pursuant to Miss.R.Civ.P. 4(c)(5) and Miss.R.Civ.P. 4(d)(5).

10. The Defendants Moore & Peterson and Gravel, Brady & Berrigan are each "non-resident . . . firm[s],

general or limited partnership[s], or . . . foreign or other corporation[s] not qualified under the Constitution and laws of this state as to doing business herein, . . . who commit[ted] a tort in whole or in part in this state against a resident . . . of this state, or who . . . [have done] any business or perform[ed] any character of work or service in this state" within the meaning of Mississippi Code Annotated Section 13-3-57 (Supp. 1991).

III. PREMISES GIVING RISE TO SUIT

11. On or about April 21, 1977, Plaintiff in the case at bar, acting as lead counsel for American Public Life Insurance Company, filed a Complaint in the United States District Court for the Southern District of Mississippi, styled and numbered: "American Public Life Insurance Company, et al. versus Roger J. LeBlanc, et al." Civil Action No. J77-0126(N) on the docket of said Court. Said Complaint is a public record and is incorporated herein by reference as such.

12. Richard 0. Rush, Charles C. Rush and Southern Educators Life Insurance Company ("SELIC") were named as defendants in said suit.

13. The claims and causes of action as alleged against defendant Charles C. Rush in said suit included:

(a)violations of Section 16(b) of the Securities Exchange Act of 1934 [15 U.S.C. Section 78(b)];

(b)violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule

10(b)(5) [13 U.S.C. Section 76; 217 C.F.R. Section 240, 10(B)(5));

(c)violations of Section 13(d) of the Securities Exchange Act of 1934 [15 U.S.C. Section 78(m)] and Mississippi Code Annotated Section 83-19-81 et. seq.;

(d)violations of Section 14(d) of the Securities Exchange Act of 1934 and Mississippi Code Annotated Section 83-19-81 et. seq. ;

(e)claims of common law fraud;

(f)claims of common law tort;

(g)claims of breach of fiducial duties;

(h)and otherwise.

14. On or about August 2, 1977, Plaintiff Michael S. Allred, acting as lead counsel for the plaintiff American Public Life Insurance Company ("APLIC"), filed a Second Amended Complaint in the above-styled and numbered suit. Said complaint is a public record and is incorporated by reference as such.

15. All of said claims were substantially of merit. As alleged in the above-mentioned Complaint, Defendant Charles C. Rush had for many years perpetrated a series of frauds, breaches of good faith and conversions of corporate assets as against APLIC.

16. As alleged in the above-styled and numbered suit, Charles C. Rush was a control person of both APLIC and of SELIC on relevant occasions.

17. The actions of Charles C. Rush as alleged in the above-mentioned Complaints were taken as an agent or officer of SELIC and/or as a joint tortfeasor acting together with said corporation.

18. The above-mentioned lawsuit was settled as between APLIC, with Plaintiff Michael S. Allred acting as lead counsel, and R. O. Rush, Charles C. Rush and SELIC by a Settlement Agreement dated December 31, 1978.

19. Said settlement was worked out between the principals and confected by counsel. At no time did Plaintiff Michael S. Allred ever talk to, correspond with, or have anything to do with Charles

C. Rush, either in connection with said settlement or otherwise, except in the relation of adverse attorney who acted and communicated through counsel.

20. Pursuant to said Settlement Agreement, a Mutual Release and Covenant Not to Sue was executed between APLIC and Charles C. Rush among others, on February 26, 1979.

21. Pursuant to said Settlement Agreement, a Consent and Undertaking of SELIC, Richard o. Rush and Charles C. Rush was executed and delivered to APLIC and the Court on February 26, 1979. In effect, Charles C. Rush consented to refrain from buying and selling the stock of APLIC.

22. Pursuant to said Settlement Agreement, a Final Judgment of Permanent Injunction as to Defendants SELIC, Richard o. Rush and Charles C. Rush was entered by the Court on May 16, 1979.

23. Under the terms of the Settlement Agreement, SELIC, which was a corporation absolutely under the control of R. O. Rush and Charles C. Rush, together with R. O. Rush and Charles C. Rush, individually, made substantial payments to APLIC and purchased from APLIC for good assets numerous over-valued assets which R. 0. Rush and Charles C. Rush had fraudulently and illegally caused APLIC to acquire .

24. The role of Plaintiff Michael S. Allred in this settlement was limited to drafting the settlement and conveyance documents, or working with the lawyers who did so. The actual settlement was worked out between Richard O. Rush and Johnny H. Williamson on behalf of the principals.

25. In connection with said settlement and the actions of R. O. Rush and Charles C. Rush taken with respect to SELIC in making said settlement, all of said parties were represented by independent counsel who were Jackson, Walker, Winston, Cantrell & Miller of Dallas, Texas.

26. In connection with said settlement and the actions of R. O. Rush and Charles C. Rush taken with respect to SELIC in making said settlement, Michael S. Allred was acting adverse to the interests of SELIC, R. O. Rush and Charles C. Rush. This fact was fully disclosed and actually known to all parties.

27. In connection with said settlement and the actions of R O. Rush and Charles C. Rush taken with respect to SELIC in making said settlement, Michael S. Allred was not in privity of contract with, was not an aider and abetter of, was not in active concert or participation with, was not cooperating with, and was not in sympathy with Charles C. Rush. Michael S. Allred did not encourage, further, participate in, induce, or have anything to do with the actions of Charles C. Rush in making a settlement with APLIC, except as an opposing attorney.

28. On or about October 1, 1984, the Insurance commissioner of Louisiana, in his official capacity as the Rehabilitator of SELIC, then known as First American Life Insurance Company ("FALIC") after a change of name, retained Michael S. Allred to prosecute claims of fraud as against Charles C. Rush, among others, for frauds, breaches of fiducial duties, torts, conversion, and other illegal acts perpetrated against FALIC by Charles C. Rush.

29. On or about April 10, 1986, Michael S. Allred acting as lead counsel for the plaintiff Rehabilitator of FALIC filed a First Amended Complaint in the United States District Court, Middle District of Louisiana, styled and numbered: "Sherman A. Bernard, etc. versus Richard 0. Rush, et al." Civil Action No. 85-458-B on the docket of said Court. Richard O. Rush and Charles C. Rush were named as defendants in said suit.

30. The claims and causes of action alleged as against defendant Charles C. Rush in said suit included:

(a)violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) (13 U.S.C. Section 76; 217 C.F.R. Section 240, 10(B)(5)];
(b)violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. Sections 1961-1964);
(c)claims of breach of fiducial duties;
(d) claims of neglect of duty and mismanagement;
(e)claims of state law fraud;
(f)claims of fraudulent conveyances;
(g)and otherwise.

31. All of said claims were substantially of merit. As alleged in the aforementioned complaints, Defendant Charles C. Rush had for many years perpetrated a series of frauds, breaches of good faith and conversions of corporate assets to his own benefit as against FALIC.

32. As alleged in the above styled and numbered suit, Charles C. Rush was a control person of FALIC on relevant occasions.

33. The actions of Charles C. Rush as alleged in the above mentioned complaint were taken as an agent or officer of FALIC and/or as a joint tortfeasor acting together with Richard O. Rush and various controlled and affiliated corporations.

34. On or about April 11, 1986, Defendant in the case at bar, Charles C. Rush, who was also a defendant in the above-mentioned FALIC case, acting through his counsel of record who were Defendants Moore & Peterson and Gravel, Brady & Berrigan and the members thereof,

filed a Third Party Complaint as against APLIC and Michael S. Allred, Plaintiff in the case at bar. Said Third Party Complaint is a public record and is incorporated by reference as such .

35. The claims and causes of action alleged as against third party defendant Michael S. Allred, Plaintiff in the case at bar, included:

> (a) alleged breach of covenant not to sue;
> (b)contribution and indemnification to "indemnify and contribute to any judgment rendered against Rush on account of such transactions."

36. Said claims were and are completely without merit.

37. As alleged herein above, the February 26, 1979 Release and Covenant Not to Sue ran from "APLIC, for itself and for and on behalf of its officers, directors, attorneys, agents, predecessors, successors and assigns" and in favor of "Southern Educators Life Insurance company its officers, directors, employees, attorneys, agents, predecessors, successors and assigns and Richard 0. Rush and Charles C. Rush, their representatives and assigns . . . .

38. The release and covenant not to sue related to "any act or omission of any kind done by said individuals or corporations at any time prior to the date of.' this release, including the future consequences of such acts or omissions . . . .

39. By exclusion, said release and covenant did not relate to acts or omissions which occurred, were committed or transpired after February 26, 1979.

40. The release and covenant not to sue expressly excluded claims . . . which might occur or otherwise arise out of acts or omissions by and between the parties herein in the future and subsequent to the execution of this agreement . . . ."

41. The release and covenant not to sue did not run in favor of Charles C. Rush from SELIC.

42. The release and covenant not to sue did not include within the scope of its terms claims and causes of action SELIC might have against Charles C. Rush.

43. The release and covenant not to sue did not include within the scope of its terms claims and causes of action which occurred or accrued after February 26, 1979.

44. The release and covenant not to sue did not include within the scope of its terms claims and causes of action which might occur or accrue against Charles C. Rush on behalf of any person, firm or corporation other than APLIC and its privies.

45. There was and still is no basis in fact for the allegation in the third party complaint that the release and covenant not to sue ran in favor of Charles C. Rush from SELIC, or from Michael S. Allred, as trial counsel for FALIC f/k/a SELIC.

46. There was and still is no basis in law for the allegation in the third party complaint that the release

and covenant not to sue ran in favor of Charles C. Rush from FALIC f/k/a SELIC, or from Michael S. Allred, as trial counsel for FALIC.

47. The third party complaint fails even to allege, as a predicate factual allegation to the liability of Michael S. Allred that such transactions were requested by and agreed to by Allred.

48. The third party complaint contains the allegation or legal conclusion, although inartfully pleaded, that Plaintiff Allred was a joint tortfeasor, co-conspirator, or one jointly and severally liable to FALIC along with Charles C. Rush for Rush's frauds perpetrated against FALIC.

49. The third party complaint contains the allegation or legal conclusion, although inartfully pleaded, that Plaintiff Allred was an actively liable party who would owe indemnity to Charles C. Rush as a passively or constructively liable party, for Rush's frauds perpetrated against FALIC.

50. There was and still is no basis in fact for the allegation in the third party complaint that Plaintiff Allred was a joint tortfeasor or one jointly and severally liable to FALIC along with Charles C. Rush for Rush's frauds perpetrated against FALIC.

51. There was and still is no basis in law for the allegation in the third party complaint that Plaintiff Michael S. Allred was an actively liable party who would owe indemnity to Charles C. Rush as a passively or constructively liable party, for Rush's frauds perpetrated against FALIC.

52. As a result of the filing of the third party complaint as alleged, Michael S. Allred was required to withdraw as counsel for the Rehabilitator of FALIC in the above-mentioned litigation.

53. On January 9, 1987, APLIC, as third party defendant in the above-mentioned suit, answered interrogatories propounded by Charles C. Rush. By this means, Allred informed Rush and his attorneys, inter alia:

> (a)that the release and covenant not to sue was negotiated and drafted between counsel;
>
> (b)that "all facts concerning R. O. Rush's, Charles Rush's and Southern Educators Life Insurance Company's participation in the settlement, and their side of the litigation settlement being consummated, were concealed from American Public Life Insurance Company under the attorney/client privilege, as the settlement was made at arms' length in an adversarial posture, and in settlement of frauds that had previously been perpetrated by R. O. Rush, Charles C. Rush and Southern Educators Life Insurance Company against American Public Life Insurance Company" [Interrogatory Answer 4, p.18]
>
> (c)"The settlement was being made in an adversarial posture and at arm's length.

APLIC had been approached by R. O. Rush to settle the case. Rush was informed that, as a result of various fraudulent and/or wrongful transactions which Rush and Charles Rush had caused APLIC to enter into prior to 12-31-75, it had on its books various real estate which it had obtained through the foreclosure of mortgages which the Rushes had induced it to make and otherwise. APLIC needed to remove these assets from its books before 12-31-78. One measure of damages as against the Rushes was regurgitation of illgotten gains. Therefore, APLIC would sell the overvalued assets to Rush in the settlement. Rush accepted this proposal. APLIC disclosed that it would accept no responsibility for the condition or value of the assets. APLIC disclosed that it would not represent anything about the value or suitability of the assets. After Rush proposed purchasing assets as mortgages through Vision, rather than in fee, APLIC disclosed the same information as to the proposed mortgages. APLIC had no information on how the Rushes and SELIC were financing the settlement, or who the real parties in interest were, or how the settlement was apportioned among them. APLIC disclosed that it absolutely required a full disclosure of all adverse information on the face of the settlement documents, or in writing by accompanying documents, to foreclose a charge of fraud if any of the assets were re-transferred to parties

without knowledge of all the circumstances or otherwise.

APLIC required that the complete interdependence of the several transactions be acknowledged because in fact, each was a.condition precedent to the other, and APLIC required the settling defendants to acknowledge this interdependence to foreclose charges of absence of consideration or fraud in apparently isolated transactions.

APLIC disclosed that it would require the release to be executed after all other instruments had been executed already so that the legal effect of the release would subsume the other executed instruments, leaving no liability from any source, specifically including the settlement

It was disclosed that the settlement was being done as it was to meet the requirements of R. O. Rush that the assets be dealt with as was done.

In effect and in summary, it was disclosed that APLIC bargained to have Rush and the other defendants finance a settlement by substituting good quality, but discounted, assets for bad assets for which they were legally liable in the first place.
APLIC wanted to be protected from any appearance of wrongdoing in the settlement

in the light of its knowledge of Rush's long history of insurance asset related frauds, and it wanted the release and judgment to be a bar to all liability arising out of all acts and omissions up to the execution of the release and entry of the judgment as an end of the matter. All this, in summary was disclosed. [Interrogatory Answer 8, pp.22-24)

(d) "There were no negotiations with Charles Rush personally prior to final execution [of the release and covenant not to sue)." [Interrogatory Answer 9, p.25-26)

54. All of these answers to interrogatories were and still are true. Therefore, Defendants, as counsel for Charles C. Rush had on relevant occasions the actual knowledge of the facts and circumstances alleged herein above.

55. Notwithstanding such knowledge, said Defendants prosecuted a meritless third party claim against Plaintiff Allred.

56. On June 27, 1986, after receipt of a civil process in Jackson, Mississippi, Plaintiff Allred wrote a letter to Moore & Peterson and Gravel & Brady. Allred gave actual notice to the Defendants of the contents of the following pleadings and matters by mailing them copies of same:

(1) Second Amended Complaint filed August 2, 1977, in Cause No. J77-126 styled "American Public Life Insurance Company v. Roger J. LeBlanc, et al" on the docket of the United States District Court, Southern District of Mississippi, Jackson Division.

(2) Mutual Release and Covenant Not to Sue dated February 26, 1979, among American Public Life Insurance Company, Southern Educators Life Insurance Company, Richard O. Rush and Charles C. Rush.

(3) Consent and Undertaking executed by Southern Educators Life Insurance Company, Richard 0. Rush and Charles C. Rush dated February 26, 1979.

(4) Final Judgment of Permanent Injunction as to Defendants Southern Educators Life Insurance Company, Richard O. Rush and Charles C. Rush dated May 14, 1979.

(5) Settlement Agreement dated as of December 31, 1978, executed February 26, 1979, among American Public Life Insurance Company, Southern Educators Life Insurance Company, Richard O. Rush and Charles C. Rush.

(6) Contract for the Sale and Purchase of Real Estate dated as of December 31, 1978, executed February 3, 1979.

(7) Contract for the Sale and Purchase of Mortgages and Bonds as of December 31, 1978, executed February 26, 1979.

(8) Resolution of Directors, Vision Investments, Inc., dated December 30, 1978.

(9) Resolution of Shareholders, Vision Investments, Inc., dated December 30, 1978.

(10) Extract from the Minutes of Southern Educators Life Insurance Company, dated December 20, 1978.

(11) Resolution of the Board of American Public Life Insurance Company dated February 13, 1979.

(12) Complaint filed February 8, 1980, in Cause No. J80-0072(N) styled "American Public Life Insurance Company v. Southern Educators Life Insurance Company" on the docket of the United States District Court, Southern District of Mississippi, Jackson Division.

(13)Consent Judgment in the next above styled suit dated September 13, 1980.

(14) Letter signed by Richard 0. Rush, etc.

57. In said June 27, 1986 letter, Plaintiff gave Defendants Moore & Peterson and Gravel & Brady and the individual members thereof actual notice that:

> (1) "You have signed a third party complaint against the undersigned personally and against American Public Life Insurance Company alleging facts which are entirely spurious, in the above referenced suit. In addition, you have made unfounded legal conclusions unsupported by fact or precedent."
>
> (2) "At the time you did this, you had the actual knowledge of the falsity of your allegations as pleaded, and you had available the knowledge that your legal conclusions were spurious.
>
> (3) "Among other completely false premises you have alleged, but not by way of limitation, you are given notice that:"
>
> > "a. The causes of action, as alleged against American Public Life Insurance Company and the undersigned never existed in that said parties did not act in concert or as part of any joint scheme with Charles Rush."
> >
> > "b. The non-existent causes of action alleged were released by release

dated February 26, 1979, and related documents misleadingly characterized in your pleadings.

"c. No claims have been filed against Rush by American Public Life Insurance Company or Allred, and none of the causes of action alleged by the Rehabilitator against Rush belong to American Public Life Insurance Company or Allred. Hence, they are subject to no covenant."

"d. It is a flat statement of falsehood to allege that American Public Life Insurance Company or Allred induced Rush to enter into any of the settlement transactions. The enclosed contracts recite the contrary and are backed up by parol evidence disclaimers and entire agreement clauses."

(4) "In filing your completely false and frivolous suit, you did so with the actual intent to harm the Rehabilitator's efforts to bring your clients to the bar of justice for flagrant and widespread racketeering activities by creating a spurious conflict of interest on the part of counsel. Your actions are defamatory and malicious, per se."

58. The filing of the third party complaint, as alleged, against Plaintiff in the case at bar was malicious.

59. The issuance of an original process upon the third party complaint and the service of same upon Plaintiff in the case at bar in Jackson, Mississippi, was malicious.

60. The continuation of the prosecution of the third party complaint against Plaintiff Allred after it was clear that same was unfounded in fact and in law was malicious.

61. The Defendants were without probable cause to file or to continue the prosecution of the third party complaint against Plaintiff Allred.

62. The Defendants were without probable cause to issue an original process upon the third party complaint and serve same upon Plaintiff in the case at bar in Jackson, Mississippi.

63. The malice of the Defendants is shown by the filing of the third party complaint and the service of original process thereon in Jackson, Mississippi with a reckless disregard for Plaintiff 's rights.

64. The malice of the Defendants is shown by the filing of the third party complaint and the service of original process thereon in Jackson, Mississippi, without probable cause to bring the said third party claim.

65. The motive of the Defendants in the filing of the third party complaint was to force Plaintiff Allred to withdraw or be discharged as counsel of record for the

Rehabilitator of FALIC in the case against Charles C. Rush.

66. The third party complaint was dismissed with prejudice by Defendants so that the claims alleged therein were successfully concluded in favor of Plaintiff Allred.

67. Defendants caused the dismissal of said third party complaint by assigning same to the Rehabilitator of FALIC incident to a settlement with the actual knowledge that same would be dismissed with prejudice.

IV.COUNT ONE: ABUSE OF PROCESS

68. In the premises, Defendants, jointly and severally, maliciously and without probable cause issued process to Plaintiff in Jackson, Mississippi, for the purpose of causing the Plaintiff to be forced to withdraw from the suit against Charles C. Rush. After maliciously and abusively issuing process to Plaintiff as alleged, Defendants continued to prosecute the third party complaint based on said process without probable cause.

V.COUNT TWO: MALICIOUS PROSECUTION

69. In the premises, Defendants, jointly and severally, maliciously and without probable cause prosecuted the third party complaint as against Plaintiff for the purpose of causing the Plaintiff to be forced to withdraw from the suit against Charles C. Rush.

70. After maliciously and without probable cause prosecuting the third party complaint as alleged,

Defendant continued to prosecute the third party complaint based on said process without probable cause.

VI. COUNT THREE: DEFAMATION

71. In the premises, Defendants, jointly and severally, defamed the Plaintiff by, falsely and maliciously and without privilege so to do, publicly accusing the Plaintiff of violating a covenant not to sue and of being an accomplice, co-conspirator, active wrong-doer, perpetrator of fraud, fellow racketeer, and crook in concert and complicity with Charles C. Rush.

VII. COUNT FOUR: INTENTIONAL TORT

72. In the premises, the Defendants have abused their superior positions as large, wealthy law firms and individuals to intentionally inflict emotional distress upon the Plaintiff, or in the alternative, have acted with such a callous, reckless and wanton and willful disregard for Plaintiff's rights as to be the legal equivalent of an intentional tort.

VIII. DAMAGES

73. As a proximate result of the actions of the Defendants complained of Plaintiff has suffered damages as follows:

(a)emotional distress;
(b)worry and anxiety;
(c)loss of income;
(d)damage to reputation and good name;

(e) loss of business good will and opportunities;
(f)and otherwise.

74. The general, special and consequential damages of Plaintiff are in the sum and amount of at least Two million Dollars ($2,000,000) .

75. The Defendants are liable for punitive damages in the amount of an additional Five million Dollars ($5,000,000).

PREMISES CONSIDERED, Plaintiff demands judgment of the Defendants, jointly, severally and alternatively in the amount of Seven million Dollars ($7,000,000), plus pre-judgment and post-judgment interest, attorneys' fees and expenses of litigation.

Respectfully submitted this 20th day of August, 1993.

MICHAEL S. ALLRED, PLAINTIFF

By:_____
KENNETH AL: RUTHERFORD
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OF COUNSEL:

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§ 13-3-57. Service on nonresident business not qualified to do business in state survival of cause of action in case of death or inability to act; service on nonresident executor, administrator, etc.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or non-resident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

Any such cause of action against any such nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator receiver, trustee, or any other selected or appointed representative of such nonresident. Service of process or summons may be had or made upon such nonresident executor, administrator, receiver, trustee or any other selected or appointed representative of such nonresident as is provided by the Mississippi Rules of Civil Procedure, and when such process or summons is served made or had against the nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident it shall be deemed sufficient service of such summons or process to give any court in this state in which such action may be filed, in accordance with the provisions of the statutes of the State of Mississippi or the

Mississippi Rules of Civil Procedure, jurisdiction over the cause of action and over such nonresident executor, administrator, receiver, trustee or other selected or appointed representative of such nonresident insofar as such cause of action is involved

The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accured against him.